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A WORD FROM THE PRESIDENT

THE Board of Trustees of the Association early this year authorized the appointment of several special committees to study and investigate the procedures and conduct of the departments and divisions of the local courts dealing with certain specialized subjects. The committees have familiarized themselves with the laws relating to the subjects and the court rules and procedures. At the suggestion of several of the committees I call upon the members of the Association to assist in the work.

The Committee on Divorce Court is studying and investigating the procedures and conduct of the departments of the local Superior Court in divorce, annulment and conciliation proceedings.

The Committee on Juvenile Court is studying and investigating the procedures and conduct of the departments of the Superior Court in proceedings under the Juvenile Court Law and the Youth Authority Law.

The Committee on Psychopathic Court is studying and investigating the procedures and conduct of the departments of the Superior Court in proceedings under the Welfare and Institutions Code with respect to mentally irresponsible persons.

The Committee on Small Claims Court is studying and investigating the procedures and conduct of the local Small Claims Court and the housing of the court and the clerk's office.

The Committee on Traffic Courts is studying and investigating the procedures and conduct of the local Traffic Courts and the matter of penalties for traffic law violations.

The Committee on Police Court is studying and investigating the procedures and conduct of the divisions of the local Municipal Court in taking before a magistrate, admitting to bail, arraigning, and taking pleas in misdemeanor cases, and in hearings and sentencing and in passing on probation applications in misdemeanor cases where pleas of guilty are entered.

The Committee on Jury Selection is studying and investigating the procedures followed by the local Superior Court and Municipal Court in selecting jury panels and means of improving the attitude of citizens regarding the obligations of jury service.

Lawyers who have had experience in these courts or in these subjects can help the committees in their work by directing attention to procedures or conduct which they think are faulty and by suggesting changes or revisions for remedying faults or improving procedures. The personnel of the committees are shown in the committee lists which have been sent to all members of the Association. Communications can best be sent to the Association office where a record of them can be kept. The accomplishments of the committees can be enlarged greatly by comments and suggestions of members of the Association.

Alex W. Davis

THE ADMINISTRATIVE PROCEDURE ACT: A CRITICISM

By John M. Hall, of the Los Angeles Bar

THE Federal Administrative Procedure Act approved June 11, 1946, is said to be the result of more than ten years of intensive study by Congressional and other special committees. It was characterized on the floor of the Senate as a measure of historic importance, meticulous draftsmanship, and far-reaching

effect.[1] A recent article in the BAR BULLETIN declares that it "should be considered a distinct accomplishment of the legal profession."[2]

An opinion that this Act will not have far-reaching effect and that it is a rather meager accomplishment from a remedial standpoint must be offered with timidity and with the utmost respect for those who have labored with the stubborn problems involved. Perhaps no such opinion should be stated at all in an article of brief compass. On the other hand, if it be true that the Act is little more than a restatement of existing law and does little to remedy evils in administrative procedure, this should be suggested, lest the idea become current that this statute has finally cured all such evils. The more the Act is praised, the more one is apt to conclude that all needed reform has been accomplished.

THE PUBLIC INFORMATION PROVISIONS

Subject to the over-all exception that matters involving "any function of the United States requiring secrecy in the public interest" or relating to the "internal management of an agency" may be kept secret from the public, section 3 of the Act requires an agency to currently publish in the Federal Register (1) descriptions of its organization; (2) statements "of the general course and method by which its functions are channeled and determined"; and (3) substantive rules and statements of general policy or interpretation. Final opinions, orders and rules are required to be published or made available to public inspection.

There is little here which requires a departure from established practice, or eliminates any prevalent evil in the administrative scheme. Much of the public information thus required has for years been furnished to Congress in reports incident to annual requests for appropriations. Rules, both procedural and substantive, have generally been published in the Federal Register since the creation of the latter following the government's unfortunate experience in the "Hot Oil" case in 1935.[3] It has usually never been difficult to obtain an "inspection" of an opin-

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[1]Congressional Record, March 12, 1946, pp. 2189-2208.

[2]"The New Federal Administrative Procedure Act—An Accomplishment of the Legal Profession," by Frank S. Balthis, Jr., 21 LOS ANGELES BAR BULLETIN 370.

[3]*Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935). Statutes dealing with the Federal Register are found in 44 U. S. C. A. 301 *et seq.*

ion or order if you took the trouble to visit the office of the agency, and under section 3(b), if the agency so elects, you will still have to visit its office to obtain this information. All in all section 3 makes little or no remedial change, though it will probably increase the volume of the Federal Register.

Turning to the provisions of the Act dealing with adjudication and hearings, two questions are suggested: (1) Does the Act accord an administrative hearing in any case where in the absence of the Act there would be no hearing? (2) Where a hearing is accorded does an interested party enjoy rights beyond those he would have had in the absence of the Act? The answer to each question seems to be a negative.

LIMITATIONS ON THE RIGHT TO A HEARING

It is clear that the Act creates no right to a hearing in any case where such right is not required by some other statute. Under section 5 the requirements with respect to hearings come into play only in cases where an administrative adjudication is "required by statute to be determined on the record after opportunity for an agency hearing." Accordingly, if you haven't a right to a hearing under some other statute, you get no benefit whatever from the provisions of the Act prescribing how a hearing shall be conducted.

But suppose you have a right to a hearing under some other statute, does the Act create any new guarantees or safeguards with respect to such hearing? Section 5(a) requires timely notice. Section 5(b) gives interested parties opportunity for the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment. Section 6(a) gives parties the right to be represented by counsel, and requires the agency to proceed with reasonable dispatch. Section 6(c) accords parties the right to obtain evidence by subpoena,[4] and section 6(d) provides that prompt notice shall be given of any denial of an application, petition or other request. Under section 7(a) officers presiding at administrative hearings and those participating in decisions must conduct their functions "in an impartial manner."

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[4]Section 6(c) contains the wholly indefensible requirement that before a subpoena is issued, the agency must be furnished with a "statement or showing of general relevance and reasonable scope of the evidence sought."

This is no more than what is supposed to be required at the present time by the dictates of procedural due process as defined by the courts.[5]

THE FAILURE TO EXCLUDE HEARSAY EVIDENCE

While section 7(c) adopts the prevailing rule that the administrative rule or order must be supported by "reliable, probative, and substantial evidence," it apparently perpetuates one of the outstanding iniquities of quasi-judicial administrative procedure in permitting hearsay testimony. It is declared that "any oral or documentary evidence may be received," and while the agency may provide for the exclusion of "irrelevant, immaterial, or unduly repetitious evidence," the exclusion of hearsay is not specifically required. In court proceedings hearsay is forbidden. This is not because of slavish adherence to precedent, but in a well founded belief based upon trial and error that the rule against hearsay prevents injustice. It is difficult to understand why the hearsay rule promotes justice in court proceedings but is unnecessary to the attainment of justice in quasi-judicial administrative proceedings. One would naturally suppose that if the hearsay rule is to be abolished, it would be much safer in the interests of justice to abolish it in the courts than in administrative tribunals; to abolish it in a tribunal presided over by a judge trained and experienced in judicial impartiality rather than in a tribunal presided over by an administrative officer who all too frequently has no such training or experience, and sometimes has little predilection for impartiality.

INADEQUACY OF PROVISIONS FOR AN INDEPENDENT AND IMPARTIAL HEARING OFFICER

At first glance, section 5(c) appears to give interested parties a benefit they did not enjoy before the passage of the Act, namely a guarantee that administrative hearings will be conducted by agency employees who have nothing to do with employees of the agency exercising investigative or prosecuting functions. Section 5(c) is supplemented by section 11 providing for the appointment of "examiners" having civil service status.[6] These provisions were apparently drafted in response

[5]See 1 Vom Baur, Federal Administrative Law, p. 281 *et seq.*

[6]By Sec. 12 of the Act the requirements for the selection of examiners under Sec. 11 are not effective until one year after the Act's approval.

to public insistence that an administrative agency should not occupy the dual role of judge and prosecutor. But further examination of the Act prompts the conclusion that it falls short of insuring this result. It requires that the employee presiding at the reception of evidence shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the agency," and that no employee engaged in the performance of such functions "shall participate or advise in the decision, recommended decision, or agency review." But the Act does not make the decision of the supposedly impartial examiner the final decision of the agency. Under section 8(a) the agency is permitted, either "in specific cases or by general rule," to require that the entire record "be certified to it for initial decision," and additionally, there may be a review of the examiner's initial decision by the agency upon its own motion, in which latter event the agency has "all the powers which it would have in making the initial decision." This means that the agency has unlimited power to take a proceeding entirely out of the hands of the supposedly impartial examiner and make its own decision unhampered by his findings or conclusions. Thus at the whim of the agency the supposedly impartial hearing officer may be by-passed, and any separation of prosecuting and adjudicating functions avoided.

NO CHANGES IN JUDICIAL REVIEW

Coming to the question of judicial review of administrative action, everyone will concede that section 10 of the Act is simply a declaration of existing law.[7]

No attempt has been made to revise or render uniform our present variegated scheme for judicial review of administrative action. If a statute creating an administrative agency now specifies that review of such agency's decisions must be to a certain tribunal, the present Act makes no change, though this may be illogically different from the review procedure provided by another statute for another agency performing comparable functions. This failure to attempt some uniformity in our present chaotic administrative review pattern was one of the criticisms

[7]This was the opinion of the Attorney General of the United States, as stated in his letter of October 19, 1945, to the Chairman of the Senate Judiciary Committee.

leveled at the Walter-Logan bill, vetoed by the President in 1940.[8]

Certainly there has been no change in the basis or scope of judicial review. Under section 10(e) the final act of an administrative agency may be set aside when it is found to be (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations . . .; (4) without observance of procedure required by law; (5) unsupported by substantial evidence . . .; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." All of this gives an aggrieved party nothing more than he had anyway under the law as it existed before the Act; perhaps less.[9]

Evils of the present order are left untouched.

Prior to this Act the doctrine of administrative finality had expanded to the point where its application frequently resulted in virtual abdication of judicial control over the quasi-judicial decisions of administrative bodies. When, for example, it was intimated that a court should accept an administrative agency's interpretation of the act of Congress creating such agency and defining its powers,[10] it should have been apparent that the time had come for a re-examination and thorough overhauling of the whole doctrine.

The stock theory used to buttress the doctrine of administrative finality has been that an administrative agency is peculiarly well informed by experience to consider the facts in a field where it has peculiar competence. The decisions are replete with such phrases as "expert, experienced judgment of those familiar with the industry";[11] "orderly informed and specialized procedure";[12] "expert agencies dealing with specialized fields."[13]

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[8]James M. Landis in 53 Harvard Law Review, pp. 1077, 1090.

[9]There is no express recognition of the so-called "constitutional right" or "jurisdictional right" doctrines, requiring a trial *de novo* in the reviewing court of disputed facts upon which the agency has denied a constitutional right or assumed jurisdiction. *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38; *Crowell v. Benson,* 285 U. S. 22.

[10]*Gray v. Powell,* 314 U. S. 402.

[11]*Gray v. Powell,* 314 U. S. 402.

[12]*Labor Board v. Waterman S. S. Co.,* 309 U. S. 206, 208.

[13]*Labor Board v. Link-Belt Co.,* 311 U. S. 584, 597.

This theory of peculiar administrative competence is commonly applied to support as against judicial revision an agency's determinations, both in the exercise of its quasi-legislative function of rule-making, and in the exercise of its quasi-judicial function leading to the imposition of sanctions. The former may be plausible; the latter cannot be justified.

It is one thing to say that an agency is peculiarly well fitted to make rules for the particular industry or activity which it is set up to regulate. It is quite another thing to say that an agency is peculiarly well fitted to adjudicate disputes or alleged violations of law or regulations. In exercising the latter judicial function its familiarity with a given subject matter should impart no added sanctity to the agency's findings. In matters calling for adjudication the courts exercise a judicial function quite competently in matters concerning every possible field of human activity. Federal courts, for example, daily pass judgment upon a great diversity of highly technical, factual matters, yet such judgments are reviewed without reference to the peculiar competence or lack of competence inherent in the trier of the fact. There is no reason why greater weight should be accorded the fact findings of an administrative body in quasi-judicial proceedings than is accorded the fact findings of a trial court. Yet this factor, *i. e.*, the "peculiar competence" of administrative tribunals, is commonly made one of the reasons for refusing to overturn administrative quasi-judicial decisions alleged to be unsupported by substantial evidence. There is danger in permitting this factor to influence the court's decision, and certainly the result obtained does not justify the risk. The fact that an administrative agency has peculiar competence in its own particular quasi-legislative field does not necessarily mean that its inferences from probative facts in a quasi-judicial proceeding are likely to be exceptionally accurate. The agency, unlike a court, has no background which would tend to cultivate a sense of judicial responsibility. It is not trained as a court is trained to "weigh and consider" impartially both sides of an issue. It has its own administrative program and policies, conforming to which it is all too prone to shape the course of its quasi-judicial conduct. The very fact that it has peculiar competence in its particular field leads it, consciously or unconsciously, toward an

attitude of bias and prejudice when called upon to sit as a judge.[14]

All this has been apparent for years, yet one searches the Administrative Procedure Act in vain for any remedy.

CONCLUSION

The difficulties encountered in framing and procuring the adoption of a general statute of such wide application must have been prodigious. Due credit should be given to those who shouldered this burden. But they had before them the sad

[14]The Act indirectly recognizes that the theory of "peculiar competence" should not be a factor in quasi-judicial administrative decisions. Sec. 11 is the section which provides for the appointment of the supposedly impartial "examiners" for each agency. This section provides: "Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the [Civil Service] Commission *from . . . other agencies.*" Thus one agency may be given the services of an "examiner" who ordinarily works for a different agency in an entirely different field of administrative activity. Thus there may be assigned to an N.L.R.B. case an "examiner" who customarily hears matters for the F.C.C. and whose supposed "peculiar competence" lies wholly in the latter field of administrative activity.

fate of a previous act of Congress vetoed by the executive. The present Act in its embryo stage was submitted to various administrative agencies which would be affected. The changes urged by the latter were then "screened." Revision ensued. The result seems to leave very little which will halt the drift toward administrative encroachment upon the functions of the judiciary, and administrative absolutism, or cause anyone who desires these results the slightest foreboding.

The conclusion suggested is this: that thoughtful lawyers withhold, at least for the time being, unstinted praise of the Administrative Procedure Act and its anticipated accomplishments; that they study the Act's shortcomings as well as its merits; and that they consider and publicize this Act for what it really is—only the first step upon a long and difficult pathway of reform.

WHAT THE TRIAL JUDGE EXPECTS OF THE LAWYER

By Frank G. Swain, Judge of the Superior Court

Editor's Note: The following is an address before the Los Angeles Bar Association October 24, 1946.

I HAVE no thought of wasting your time by lauding the profession of which you and I are members, nor of preaching you a sermon on manners or morals. During the time allotted me I hope to make some constructive suggestions which will be of practical value to you in the practice of law. The best law school I ever attended has been the school of the Superior Court of Los Angeles County, and my instructors have been the members of the Bar of California. I shall attempt to share with you a few of the things you have taught me.

First: A judge expects attorneys to be accurate. I once asked Professor Cathcart, formerly of the law school of Stanford University, what liberal arts courses a man should take who intends to study law. I expected him to say English literature, history, languages and the cultural courses. To my surprise he said mathematics and sciences which train a young man in habits of exact thinking. I have had to learn accuracy the hard way and I am still trying to learn it. I have seen the need of it in all departments of the court but particularly when sitting in probate

matters. For example, it is of utmost importance that the heirs and devisees should get as good a title to real property as the deceased had and yet I have seen decrees of distribution which described real property only by the street number. I had one decree of distribution before me for consideration in which a testamentary trust was created. One parcel of real property was described in that decree as "an unimproved lot in Orange County". Another one described real property as "a two story house in Brightwood". Not even the name of the place was correct because the house was in Wrightwood, not in Brightwood. After the time has expired for amending these decrees under C. C. P. 473 these errors can be corrected in court only by a quiet title suit. Such carelessness upon the part of attorneys is almost malpractice.

Second: A judge expects attorneys to be well grounded in the law of evidence. The most misunderstood and most misapplied part of the law of evidence is the hearsay rule. The popular definition seems to be that hearsay is any conversation had in the absence of the objecting party. This is not correct. Elliott gives this definition (I Elliott on Evidence, p. 428) "Hearsay evidence is evidence whose probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it". If a plaintiff in a divorce case attempts to testify that Mrs. Jones told her that her, the plaintiff's, husband was running around with other women, that clearly is hearsay, because whether the court believes the defendant was running around with other women depends on the credibility of Mrs. Jones, who is not before the court. Thus it is true that many conversations had in the absence of the objecting party are hearsay, but not all of them. If it is material and relevant to prove that a thing was said by a third party, any one who heard the conversation may testify what was said, because the weight to be given to the testimony that such thing was said depends on the credibility of the witness on the stand. Thus it is often material and relevant for a plaintiff to prove an oral contract with a third party. For example, if the plaintiff's rights to the possession of personal property depend on an oral contract with the owner, the plaintiff in a suit to recover possession of that property from a third party may prove that oral contract. Whether such a contract was made

depends on what was said. Any one present at that conversation may testify what was said even though the defendant was not present, because the weight to be given the testimony depends on the credibility of the witness who relates the conversation. This seems elementary and I would apologize for taking your time to discuss it were it not for the fact that not only the bar but also the bench often misunderstands the rule.

A most interesting and to me entertaining example of this is the controversy which has raged between two divisions of our District Court of Appeal. In *People v. Reifenstuhl* (37 C. A. 2d 402), a bookmaking case, the arresting officer testified that he raided the defendant's place of business; that the telephone rang twice and he answered it. Over the objections of defendant's attorney the officer testified what was said by the parties on the other end of the line who were attempting to place bets on horse races. The second division of our District Court of Appeal held that this conversation was not hearsay. The same was held in

People v. Joffe (45 C. A. 2d 233). But in *People v. Barnhart* (66 C. A. 2d 714, 724) one of the justices of the first division of our District Court of Appeal said, "It is futile to argue that such evidence is not hearsay. . . . To relax the rule just to uphold the conviction of a bookmaker, or for any other purpose, is nothing short of judicial stupidity". In *People v. Radley* (68 C. A. 2d 607) the second division countered with a quotation from Wigmore on Evidence to the effect that these telephone conversations were not hearsay because they were admitted to prove that the words were said and not to prove the truth of what was said. The aforementioned justice of the first division, in *People v. Jerman* (72 A. C. A. 434), countered with what should have been a body blow. He said the argument of the second division was what is known in logic as "circulus in probando". At that point the Supreme Court mercifully stepped in and granted a hearing. To date it is undecided. But, tested by the definition which I read you from Elliott, these conversations are not hearsay. They are admitted to prove what words were said. Whether those words were said depends upon the credibility of the officer who testified. The serious question in these cases is not, Were those conversations hearsay? but, Are they material? Is the fact that several unknown persons attempted to place bets by telephone evidence from which the deduction may be drawn that the place was kept for the purpose of receiving bets? I believe that such is a legitimate deduction because it shows the method of business in operation at the defendant's establishment, and it is also well known that many bookmakers receive bets by telephone. I mention all this detail merely to show that there is considerable justification for lawyers and judges not understanding the hearsay evidence rule. If the gods on Olympus do not agree what can be expected of us poor mortals?

In the third place, the judge expects an attorney to make an argument which starts somewhere and gets somewhere. The only way to do this is for the lawyer to have clearly in mind the points he wishes to make. In other words, to have a clear outline of his argument. This, again, sounds elementary but too often a lawyer will merely ramble in his argument. He will start on one point, then switch to another, then come back to the first point, then switch to a third, then come back to the first point

again. Suddenly some new idea will hit him which he hasn't thought of before and he will go off on a side trip. That kind of a speech is hard to listen to. It serves only to make jurors and judges restless. If this were the exception in court I would not mention it but I am afraid it is the rule, not the exception. A good argument is not necessarily an eloquent one but it must be one which is the product of clear thinking.

In the fourth place, a lawyer should not ask the judge to give too many instructions to the jury. The greatest fiction in which the law indulges is that twelve laymen can hear a judge read a set of instructions once, understand them and apply them to the evidence. For some time I have had a growing conviction that lawyers request the judge to give too many general instructions—that many of these serve only to confuse and mystify the jury.

To test this theory of mine I selected thirteen instructions which are usually requested in damage cases. With the cooperation of Dean Hale, Professor Stanley Howell, and Professor Sheldon Elliott, and as a part of my preparation for this speech, I went to U. S. C. Law School. I read these thirteen instructions to a class of freshmen and then gave them a written examination based upon the instructions which I had read. One hundred ninety-seven men completed the test. The instructions which I read them were those regarding the following: respective duties of judge and jury; burden of proof and preponderance of evidence; direct and indirect evidence and the difference between a presumption and a deduction; presumptions and the burden of proof; weighing conflicting evidence; issues to be determined in judging liability such as was the defendant guilty of negligence which was a proximate cause of injury to the plaintiff and was the plaintiff guilty of contributory negligence; the definition of negligence; the definition of contributory negligence; the duty of every one using a public highway to use ordinary care; proximate cause and concurring causes; and the plaintiff's burden of proving the elements of his damages. The questions which I asked were:

1. What is the exclusive province of the judge in a jury trial?
2. What is the exclusive province of the jury in a jury trial?

3. What is the difference between a presumption and an inference?
4. What is the difference between negligence and contributory negligence?
5. How much evidence must be presented to sustain the burden of proof in a civil action?
6. What three things does a plaintiff have to prove in order to recover judgment in an action for damages for personal injuries received in a collision between an automobile which he was driving and one driven by the defendant?
7. What effect does a presumption have on the burden of proof?

Most of the students gave fairly good answers to the questions about the respective duties of judge and jury but some of the answers to these questions had the charm of novelty. For instance, one student said that it was the duty of the judge "To determine points of law from the facts decided by the jury". Another said, "To charge the jury as to the facts of a case, so

that they may decide." Practically every one failed to state correctly the difference between a presumption and an inference and the effect of a presumption on the burden of proof. Typical answers were: "A presumption is an hypothesis or premise of a basic nature, whereas inference is that line of thought drawn from presumptions and supported by ensuing facts". "A presumption is the whole point of a case to which all the claims of the defense or of the prosecution might lead." One student whose work was above the average, but far from 100%, added this note after answering the questions: "This is the impression that one reading of the instructions seemed to have upon me. I know that a great deal was read about presumptions in favor of the defendant and those in favor of the plaintiff, *but those instructions were too involved for one reading*". (Emphasis added.)

The only surprise I got from the test was that no one correctly stated the three things a plaintiff in a personal injury action has the burden of proving. Most of them said that he has to prove, among other things, that he was free from contributory negligence. They forgot that he has to prove the extent of his injuries!

My conclusion from this test is that the instructions requested should be those which are clear and to the point; that the fewer requested the better; and that an attorney should never request such instructions as the ones on presumptions and inference, and presumptions and burden of proof. These serve only to confuse and alarm the jury although they are correct statements of the law.

In connection with the desire to improve jury trials I constantly ask myself the question, What can we do to establish a sounder basis for awarding general damages? Practically the only instructions we can give on general damages, other than loss of earning power, are that the amount of general damages to be awarded rests in the sound discretion of the jury, limited only by the wishful thinking of the complaint. In other words, we turn the jury loose on an unknown sea without chart or compass and tell them to reach that far away islet named "a just verdict". They have no idea what is customarily awarded for similar injuries. Of course the trial judge, on motions for a new trial, may act as a check on the jury. Some trial judges exercise that authority freely and conscientiously but others are

satisfied to let the verdict stand if they think the judgment will not be reversed on appeal. But I ask you, how can a trial judge know what award of general damages is reasonable? He does know a little more than a jury about what has been awarded in similar cases but even he has comparatively little to guide him. Appellate courts are of small help. The established attitude of those courts is stated in *Bellman v. S. F. High School District* (11 Cal. 2d 576, at 586): "While the sum to be allowed as damages for personal injuries is left to the sound discretion of the jury, it is subject to review by the trial judge in ruling upon a motion for a new trial . . . and the power of this court to relieve a defendant from a judgment for damages in an amount so plainly and outrageously excessive as to indicate that it was arrived at as the result of passion or prejudice has often been recognized and exercised".

There is a line of cases of which *Linderman v. San Joaquin Cotton Oil Co.* (5 Cal. 2d 480) and *Ure v. Maggio Bros. Co.* (32 Cal. App. 2d 111) are typical. In these cases the Appellate Courts have reduced awards of damages without any reference to a presumption of passion and prejudice, and apparently upon the ground that the excess over a certain amount is not supported by the evidence. If Appellate Courts would follow the practice of exercising greater control over awards of damages either on the theory of passion and prejudice or on the theory that they are not supported by the evidence, trial courts might soon come to have some general guides for awarding general damages. The value of these general guides was recognized by our Supreme Court in 1931 in *Maede v. Oakland High School District,* 212 Cal. 419, 425: "Out of the long experiences of the past, in which all the elements and inconveniences of loss have been considered, weighed and appraised, a standard, not invariable, it is true, has been adopted by courts of law. The average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts, has its place in arriving at the estimate." In this case the Supreme Court held that the award "so greatly exceeds the amounts of award in the average cases as to justfiy the claim . . . that the verdict of the jury was the result of passion or prejudice." In arguments on motions for new trial great importance is attached to the statements of appellate courts as to what amounts are or are

not so excessive as to raise a presumption of passion and prejudice. I know we can never reduce the basis for awarding general damages to a mathematical certainty but surely the unsound or unscientific basis on which general damages are now awarded is one of the glaring defects of our law and one of the greatest weaknesses of our courts. It is no use to say that it has always been that way and that we can do nothing about it. If we don't do something about it the day will come when there will be a popular demand that this type of business be taken away from the courts and given to a Commission. I cannot tell you what a trial judge expects from the bar on this but I should like to ask you what the trial judge should do about it. How far should he go on a motion for new trial, and how can he know what amount of general damages is just?

Another point in connection with jury trials: Do you ever feel that the process of selecting a jury is a dull affair? Shortly after I was appointed to the bench I tried an important criminal case. It took two weeks to get the jury. A great deal of that time was consumed by questions such as: "Do you understand the doctrine of proof beyond a reasonable doubt?" "Do you understand the difference between proof by a preponderance of the evidence and proof beyond a reasonable doubt?" Since then I have come to realize that jurors do not have to know any law and that a judge should rule out all questions designed to test their knowledge of law. A related type of question is: "If the court instructs you that such and such is the law, will you follow that instruction?" These questions are asked merely for the purpose of giving the jurors advance instruction in law. The examination of jurors is not intended for that purpose and the judge may rule out all such questions. If he does, so much time will be saved. The authority for excluding these questions is *People v. Spraic,* 87 Cal. App. 724. To the same effect is *People v. Tibbetts,* 102 Cal. App. 787. The *Spraic* case does hold that it is proper to ask a prospective juror if he has any prejudice against insanity as a defense but this does not mean that a lawyer may instruct a juror as to what the defense of insanity is and then, in effect, say, "Now have I prejudiced you?" By like token it is proper to ask a prospective juror if he is prejudiced against laws prohibiting the sale of liquor where those laws are involved in the case, but this does not give a lawyer the privilege of tak-

ing the court's time to instruct the juror as to those laws. I have had many jurors thank me for excluding questions of the "if the court instructs you" type. They say it is very monotonous to sit through a long examination of jurors while those questions are repeated and repeated ad infinitum. The trial judge expects the lawyer to have mercy on the court and jury in his examination of prospective jurors and to confine his inquiries to questions which will give the court and counsel information about the individual jurors.

In collaborating with our Presiding Judge, in my preparations for this talk, he emphasized the importance of attorneys being on time. I am glad that none of the judges lives in a glass house. No busy department such as the Calendar Department can function properly unless attorneys are on time. If attorneys are actually engaged in trial in another department, such as in the trial of a default divorce, when their case is to be called in Master Calendar they should without fail notify the clerk of the Master Calendar Department what they are doing and where they are. Being actually engaged in the trial of a contested case in any court is a ground for continuance of the trial of a case not yet started but merely waiting for a trial in a lower court is not grounds for a continuance.

Time does not permit me to discuss any more points. I realize that I have not given you an overall picture of my subject. I have made only a few isolated suggestions. They probably stick out like bones in a compound fracture. But if I have given you anything of practical value, I shall not have died in vain.

WHAT THE PROFESSION EXPECTS OF THE TRIAL JUDGE

By John Perry Wood, of the Los Angeles Bar

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IT IS a real privilege that has been granted me to speak for the bar on this occasion. Never before, to my knowledge, has the bar, collectively or by representative, been privileged to tell the judges openly what it thinks of them. I must not muff the opportunity.

None of the shoes that I expect to display will fit some of the judges. Some of them will fit, variously, quite a number of the

judges. I venture to hope that these will recognize their numbers, put the footwear on, and thereby in time increase the comfort of their judicial preambulations, enlarge their judicial girth and grow in the esteem of the bar.

The court should realize that the true lawyer is not merely a paid advocate. He is a minister of justice, just as much as is the judge. He must stand for his client, against any oppression or tyranny, often against Government, more frequently against agencies of Government that arrogate to themselves the right to vitiate the Constitution. He must, if need be, stand against the court itself, respectfully always, but with courage and unwavering firmness.

There is a little book by Judge Robert N. Wilkin, of the sixth circuit, a great judge and a great citizen. The book is published by the Yale University Press. Every judge and every attorney should possess a copy and read and re-read it. It is a glowing picture of the glory of the law and it's right administration. It is entitled: "The Spirit of the Legal Profession". Let me quote a few sentences from it:

> "Not only is the lawyer the oracle of the law, he is the voice of one of humanity's deep and abiding needs. The profession was not carved out of whole cloth for its own purposes; it came into existence, and continues to exist, in answer to one of its primitive cravings of the human heart. Early in history man expressed his yearning for a champion to meet his accusers at the gate. Since to err is human, a defender is a human need. * * * When man is most vitally affected, he has greatest need of disinterested counsel. * * * It is proof of man's charity to man that he has provided that when man stands accused he shall not stand alone. To be accused is to be in part condemned. To stand charged with crime in the public forum, to be indicted before the bar of justice, leaves one speechless. To speak in one's own behalf defeats one's purpose. * * * One's weakness is one's only strength. But, thanks to the legal profession, that weakness has not been left defenseless. Cicero defied the hired accuser of the ruthless Sulla in order to champion the cause of Roscius. Doubting his own ability to do well what older men had feared to undertake, he comforted himself with the thought that he would do the best he could and that 'at least Roscius would not find himself without counsel.' Malesherbes defied the revolutionary mob—

more terrible than a dictator because more senseless—in order to defend his former sovereign, Louis XVI. Though no longer a monarch, Louis was still a man, and his counsel therefore stood for him at the bar—and followed him to the guillotine. Hale defied Cromwell and Erskine defied the very judge on the bench in order to defend the sacred right and duty of a lawyer to act for his client. Finally this right and duty, championed by many lawyers through many years, received sanction in the charter of the American republic. The magnanimity of the law is preserved even against its offenders. Man may be accused but not abandoned, foresworn but not foresaken."

Let me add: There in the breach, for the accused, for the civil litigant, stands the true lawyer. Let no judge assume the right to deny him the full performance of his high duty.

I do not, of course, speak of the lawyer who, through ignorance or worse, seeks to visit upon the Court and his adversary brash and presumptuous misconceptions of law or fact. Him, the Court, in considered and temperate manner, must restore to his proper place. But until the contrary is clear, the lawyer should be assumed by the Court to know his case, to have worked upon it diligently, and to be prepared to develop the truth and present the law.

The bar does not expect of the judge weakness or vacillation. Formerly it was the King, today it is special groups, vociferous minorities, great interests or powerful organs, that would intimidate the Court. The orders of these are not so direct, but they are just as pressing and sinister upon the elected judge as were the orders of King James to his judges, until Coke repelled them, saying boldly to the King: "When the case happens, I shall do that which is fit for a judge to do," and there laid the foundation of the independence of the English judiciary, putting them under only "God, the law and their consciences."

The elective judges are constantly under political pressure, conscious or unconscious. Their judgments often impinge upon their personal interests; threaten their tenure. Those that stand steadfastly against that pressure are entitled to, and have from the bar, that same veneration that rests today upon the head of Coke like a golden aura.

Let no judge consider who are before him, according to their influence. The judge who combines learning with courage and

independence in considered judgment, need never fear for his tenure. The bar and the rightly disposed citizenry—and they are in the great majority—will see to that.

The grandest, the holiest work that any lawyer can do is to be invested by the State with the power to administer justice and then do it with learning, care, patience and courage. Indeed the work of the good judge applies the attributes of divinity more nearly than the work of any other man, and I do not exclude even the clergy. If every judge looked upon his judicial work in that light, the bar would have little complaint. But they DO complain—often bitterly—and they have just ground for complaint in many instances.

Let us now consider some of the specific qualities and conduct that the bar expects of the trial judge:

Of courage and independence of influence of any sort, I have spoken sufficiently within the time allotted. Without the character upon which these qualities are founded, no man can be a good judge.

Learning. Who will deny the need of such? But some men do ascend the Bench with little learning and little experience. Are these hopeless to themselves and in the view of the bar? By no means. The bench is a great college. The bar, by and large, is a good teacher; but they must be harkened to. Even a poor lawyer at times can teach some new point to a very good judge. A poor judge can learn daily if he will. There are few judges in our local trial courts of record who could not become good judges if they would. A man of little learning, who is modest, who is open to instruction, who will listen, be considerate, work hard and really try to administer justice under the law, forgetting all politics, *can* become a good judge, perhaps even a great judge.

Judges should make every effort to determine the principles of law applicable to the case. Controlling cases, of course, cannot be pushed aside. They must be followed by the trial judge. However, under the English common law, which is the illimitable birth right of most American law, principle is the guide. Cases serve only to establish or elucidate the principle. The principle being known, the judge can determine what cases really do apply to the facts before him. Indeed the principle will be decisive.

But the judge should not go off upon some legal theory of his

own which has not been argued by counsel. If, upon his own research, he discloses principles or cases which he deems controlling, he should give counsel the opportunity to show him whether his tentative conclusion is correct. He will then be either confirmed, or he will be able to rectify the mistake.

If the judge is without good, ordinary horse sense, he will have trouble over the facts. However, if he have such sense—and unless he has he should not be on the bench at all—and if he is attentive, he can weigh the evidence and know, with fair accuracy, where the truth lies. He cannot, however, unless he be patient, diligent and willing to listen to counsel. Unfortunately, at times, some judges seem to think that they are invested with second sight and can determine facts and law for themselves, without the aid of counsel. Having read the pleadings, they know all about the issues and the case. Sometimes they do, but sometimes not. I submit, counsel should be allowed, at times required, at the opening of the trial to state the issues, to state the facts that he expects to prove, and to state in substance what he deems to be the controlling principles of law applicable. The judge then will be infinitely better able to grasp the issues and understand the relevancy and competancy of evidence as it is offered.

Some of the judges, even some of the best of them, at times express views at the very opening of the trial in such manner as to convey the impression to litigants and spectators that they have already formed an opinion of the merits of the case. Such expression should be avoided until the evidence is in.

Some of our judges, actuated by the highly desirable motive of expedition, are inclined to unduly rush through the trial. At times they prevent a full and proper presentation of the case. They take it over and risk losing it for the side that should prevail.

The opposite of this is the hesitancy of some judges to rule forthrightly upon anything. These end by letting everything in and making a record that neither side could support on appeal, even if the unfortunate client can pay for the wasteful transcript. If a line of evidence is questionable the judge should hear enough argument to enable him to settle that issue and be done with it.

The court should not sit idly by and allow time-consuming evidence upon minor issues, if it be manifest that there is a major

issue which is controlling. When such appears, the court should so announce and limit the evidence accordingly.

Cases should not be held under submission for extended periods. If the court allows counsel adequate opportunity for evidence and argument, cases—at least most of them—can and should be decided upon the close of the trial and arguments. Counsel who come into court for trial should be prepared both to present and argue their case. Too often one is unprepared, or sees himself losing, and asks time for briefs. To accord it is often highly unfair to the diligent and prepared lawyer. Is it not better, in such case, to hear the argument? Then, if the court is in doubt, or if the unprepared counsel suggests points upon which the court needs elucidation, there is still time to enable briefs upon the unclear points.

A judge must not allow consideration of the qualities of the lawyer on the one side to bias him in favor of that side and against the side that may be represented by a very poor lawyer. Often the litigant who is poorly represented is in the right. The burden of the judge then is very great. It is his duty to ascertain what the facts are, what the pertinent law is, and to see that justice is done, despite the disparity in ability between the lawyers. A witness may be wrongfully put in an unfair and untenable position. Then, often a few questions by the observing and impartial judge will set the matter straight. Ordinarily, however, the judge should reserve his questions until the conclusion of examination of counsel.

A judge, when he has heard the argument, either upon a point of evidence or upon the final issue, and has reached a considered conclusion, is not obliged to give way to over-weaning insistance by counsel for more talk. At the same time he should not be stubborn nor dogmatic. Some judges, unfortunately, try to create an *impression* of ability and firmness when they really are neither able nor firm. To them, to be arbitrary is to be firm. They believe, apparently, that they thereby show strength. They really demonstrate weakness. These deny themselves opportunity to grow in ability and strength. In the end they lose the respect of the bar. A judge can be firm and confident of his position and maintain it, without being so cocky as to be offensive or to create the impression that he goes off half cocked.

Please do not understand me to suggest that celerity of judgment, particularly upon points of evidence, should be condemned. A judge should rule as he sees it. He should, however, harken to argument and be ready to reverse his position if law and justice require it.

A judge should be courteous to counsel, to litigants and to witnesses. He should be, and then always will appear to be, a gentleman and a scholar. An unmannerly judge is a misfit. To be voluble or arrogant gives credit to the judges' critics. Parties, witnesses, even many jurors, usually attend Court as a new experience. They regard the proceedings as important. If the judge is discourteous, unmannerly, if he wise-cracks or makes side remarks, if he does not conduct himself with dignity and a decent regard for the importance and solemnity of the proceedings, if he has not that humility which is one of the most significant marks of greatness, he injures the standing of the Court and the respect of the people for the law.

I realize that often some counsel sorely try the patience of the judge. Let the judge remember, however, that the lawyer may be doing the best that he can and that an impatient judge sometimes can so increase the pressure upon the lawyer's mind, particularly the mind of the young and inexperienced lawyer, as to almost deprive him of ability properly to represent his client. These especially need the courteous consideration of the Court and his impartial help in developing the truth. The advocate may be wrong but so long as he is respectful and decently fair, he is entitled to courteous treatment at the hands of the Court.

The discourteous judge, in the nature of things, cannot be *efficient* in justice. The discourteous state of *mind* is *alien* to justice. The unmannerly judge prejudices not only the lawyers and the litigants but he prejudices his own mind. He destroys its even tenor. A judge of limited capacity, who *knows* his own limitations and is modest, will learn and is respected. But a small man on the bench, who is just dumb and does not know it, gets puffed up by power. He puts on a great front. His ignorance becomes hyper-active and exceedingly clear, though he does not know it. He is really like the bailiff in a few departments who, with sonorous throat, opens court with strange and

elaborate announcements designed to impress *all* with the majesty of their court and the greatness of their judge.

A judge must be industrious. In a crowded court, such as the Superior Court for this County, the burden of judicial work is great. Even a great judge can accomplish justice only by unceasing *labors*. The well-qualified judge often will know with certainty, upon the conclusion of the evidence, how the case must go. In an ineffective effort to imitate such, the unqualified judge too often commits grievous error. Even the well-qualified judge should give to counsel whom he thinks is in the wrong, fair opportunity to change the judicial view by argument. When all is said and done, justice speaks through him who sits and decides. The judge represents the law. In a very real sense he IS the law. Given a judge, wise, imbued with a passion for justice, patient, though not necessarily inordinately patient, who listens before he decides and who is industrious, and justice will be well administered under any system of laws known to English-speaking people. Given the other sort of judge—one unlearned, impatient, whose mind is upon the next election, and

justice will be poorly administered under the best of laws. In the last analysis, a good judge is more to be desired even than good laws, for he usually can find a way to do justice.

A judge should not be wasteful of the time of the litigants and lawyers. More than one judge rarely opens his court at 10:00 o'clock and rarely resumes at 2. He usually rises at 4:30, or earlier, even in non-jury departments, and most of the time indulges himself in long and unnecessary recesses, cutting the time available to the litigants to something like three hours instead of the four and one-half hours available in jury cases and the five hours in non-jury cases. There is no excuse for a judge sitting down in his chambers with politicians or "do-gooders" or spending long times on the telephone, during court hours. A judge is paid to give his judicial day to his judicial work. Courts are created for litigants. Litigants do not exist merely for the convenience of judges. And judges should remember that lawyers must make a living and that they cannot earn fees while they are sitting around in court with their clients, idly waiting.

From time to time there is talk of the need of more judges in our trial courts. Perhaps they are needed. Our population and litigation are growing enormously. However, if ten judges lose an hour a day, it is equivalent to the full working time of two judges. Time wasted in judicial vacillation and uncertainty, in the reception, often through unnecesary days, of evidence immaterial or incompetent, upon the too prevalent theory of letting everything in, accounts for the loss of time equivalent certainly to the full working time of a number of judges.

If the law and motion work can be more thorough and careful, an enormous loss of time to the trial judges will be avoided. If there can be less improvidence in the issuing of writs and orders to show cause where the pleadings themselves, if properly examined, show that the order or writ should not issue, much more time of the trial departments will be saved.

Sometimes a judge, possibly after hours or days in trial, not knowing what to do, says: "Now you gentlemen go out and settle this yourselves." This can be terribly exasperating. The practice should be avoided, except perhaps in the occasional case when the device is used by a wise judge to encourage a settlement where strict law might require a judgment morally inde-

fensible. Judges sit not only to hear but to determine. They should not shirk their responsibility.

Please do not take this as an indictment of the whole bench. Nothing could be more unjust to the many admirable judges now working magnificently. But poor judicial work by even one-fifth of the bench slows up the whole judicial mechanism, not alone in the departments comprising the one-fifth—or whatever the fraction should be—but in many other departments which carry on the work in which the others first participate.

The judge should have time during ordinary working hours, and such others as he reasonably can use, to dispose of his submitted causes. Such should be accorded by the Presiding Judge. He has means of knowing whether a judge is soldiering. He will know, also, that a cause submitted is as much entitled to determination as is the trial of another cause later set for trial. However, a judge has no right to work on submitted cases when litigants are waiting in his court room.

The trial judges, strong and weak alike, would do well to bear in mind that many, if not most, errors can *not* be cured on appeal. An erroneous decision by the trial court upon the facts can, and often does, work the grossest injustice. Let it be remembered that the power of the trial court "to hear and determine," even the power to decline to hear argument, does not connote any moral right in most cases to determine a case without hearing argument nor—and this is an occasional but a very great abuse—to decide a case on one theory of law and then, finding the theory untenable, cook up the findings in such a way as to preclude review.

Having decided the case, adequate opportunity should be

given for correction of error upon motion for new trial. Here, again, great injustice can be done by ill-advised consideration of the facts. The practice of setting the hearing of motions for new trials at odd hours, when it is obvious that time will not be available for proper presentation of the motions without at least keeping other litigants and lawyers waiting, ought to be abandoned. True, at times, motions for new trial are merely gestures made perfunctorily, merely for the purpose of extending the time within which to appeal or to oppress the adversary. Where such happens, the judge quickly will realize it and act without loss of time. However, where the motion has semblance of ground, it should have an adequate hearing, at a proper time.

It is often said that a judge should have judicial temperament. He should have. But what is judicial temperament? Surely it is not the temperament of the owl, which looks wise but is not after all a very wise bird. He cannot even see well in the daylight. A judge who has been a vigorous advocate may have the finest of true judicial temperament, namely, the disposition to hear fully and decide carefully only after proper hearing and argument.

But a judge should not allow himself to become a mere umpire in a contest of skill between lawyers. He is the primary and, in most instances, the final minister for justice in the given case.

There have been so many attacks on the courts in recent years that some of the judges seem to have developed inferiority complexes and tend to show a lack of independence, particularly in dealing with executive authority, administrative commissions and strong special groups. A little more of the traditional attitude toward the greatness and grandness of the common law would be wholesome. Let us hold with Sir Frederick Pollock when he said:

> "If there is any virtue in the common law, whereby she stands for more intellectual excellence in a special kind of learning, it is that Freedom is her sister, and in the spirit of Freedom her greatest work ever has been done. By that spirit our lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal justice and ordered right into every quarter of the world."